IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY,
as Trustee, *Appellant*,

vs.

THE CITY OF TACOMA, *Appellee.*

No. 2601

APPELLEE'S BRIEF

APPEALED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, CUSHMAN, D. J.

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Tacoma, Washington.

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AUTHORITIES.

About 1899 The Tacoma Railway & Power Company, (which we will call the "Railway Company") then operating a street railway system in the City of Tacoma, mortgaged its property to the Old Colony Trust Company, as Trustee, to secure bonds in the sum of $1,300,000. which bear interest at 5 per cent. The property of the mortgagor company is of the value of six or seven millions, and its income in 1914 was $1,060,210.74.

In 1905 the Railway Company procured the passage of Ordinance 2295 by the Council of the City of Tacoma which conferred upon it the right to maintain poles and wires in the streets over which to convey and sell electric current for heating and power purposes. Appellant is contending that, under the terms of its mortgage, the rights acquired by its mortgagee through the ordinance inured to it as a further security. The Railway Company did not manufacture electric current, but bought it at a cost of about .575 of one cent per kilowatt hour. In connection with this business it employed about three thousand dollars worth of poles and wires, and sold $25,000 to $50,000 worth of current per annum at an expense of about $18,000.

The operating expenses and taxes of the Railway Company for 1914 were $843,706.17, which left $216,504.57 with which to pay the $65,000 due appellant as interest on its mortgage debt, which is a first lien.

The foregoing facts are set forth from the record in order that the Court may see just how trivial this proceeding is, since appellant has nearly five times the face of its debt as security for its principal, and more than three times its interest in net income of its debtor. These facts and others which abundantly appear show clearly that this appellant is merely lending its name and technical claim of lien to assist the principal defaulter in escaping the consequences of its own delinquency after the whole matter has been adjudicated in the courts of Washington at its own suit.

TACOMA RAILWAY & POWER CO. v. CITY OF TACOMA.

The Charter of the City of Tacoma, as amended in 1896, contained the following, which was continued as Section 233 of the Charter of 1909, viz:

"The legislative power of the city is forever prohibited from granting to any person or corporation whatever, a franchise, privilege, or right to sell or supply water or electric lights within the City of Tacoma, to the city or any of its inhabitants, as long as the city owns a plant or plants for that purpose, and is engaged in the public duty of supplying water or light; except that the City Council may grant a franchise to supply water or electric light to any section or part of the city of Tacoma, not supplied or furnished by the city water or light plant, to cease and determine at such time as the city of Tacoma shall furnish and provided water and light in said section or part of the city."

Tacoma had had its own municipal light plant since 1893.

Therefore, when in 1905 the Railway Company sought a franchise to enable it to distribute and sell electric current the purpose of the grant was limited thus:

Section1. That there be and is hereby granted to the Tacoma Railway and Power Company, a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, its successors and assigns, for a period of twenty-five (25) years, the right, privilege, authority and franchise to erect and maintain pole lines and underground conduits and to stretch wires thereon and therein, over, along, across, and also underneath the streets and alleys of the City of Tacoma in the manner hereinafter provided, for the purpose of transmitting, distributing, and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation, and for any other use or uses to which electricity maybe put, except as hereinafter provided; *Provided, that neither said Tacoma Railway and Power Company, nor its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos, or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association, or corporation,* except, where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway & Power Company, its successors and assigns,

the right to sell power for power and heating purposes and for lighting street cars; but in no event except as hereinafter provided, shall the said grantee, its successors and assigns, furnish power to be used for lighting or generating electricity for lighting; PROVIDED, FURTHER, however, that nothing in this section contained shall prevent the said city from granting the said Tacoma Railway & Power Company, its successors or assigns, by special permit, the right to furnish any person, firm, or corporation, within said city, or said city, electric current for lighting purposes, subject to the provisions of the City Charter and the laws of the State of Washington; such permit, however, to be revocable at any time at the option of the City.

The reason for such a restriction was obvious. The City's lighting plant, necessarily constructed with overhead poles and wires, covered every part of its street system, and to authorize another concern to enter the same line of business would inevitably lead to more lines of poles and wires. Besides which, the City had a perfect right to maintain for itself a monopoly of the lighting business. Its Charter, Amendment 14, quoted above, enjoined protection of that right. On the other hand the power and heat business would naturfally be confined to the business sections of the City, and the City was not then furnishing current for such purposes.

The ordinance, perhaps unnecessarily, contained a declaration that the City might grant to the Company special permits to furnish current for lighting purposes, which permits should be revocable at any time, at the option of the City.

These provisions about furnishing current for lighting were conditions subsequent upon which the right to exercise the franchise at all always depended and by accepting the franchise the grantee expressly undertook to perform them; to insure their performance Sections 11 and 17 were enacted.

Section 11 (Trans. p. 25) declared that without the passage of any resolution or ordinance the rights granted should be null and void and absolutely of no effect "upon the failure of the grantee * * * to perform any and all of the conditions in this ordinance specified" for a period of thirty days after notice served upon it to the effect that if it did not correct the failure within that time its franchise would be considered null and void. And in that event, unless it removed its poles and wires within sixty days, they should be forfeited to the City.

Under Section 11 the forfeiture is automatic, and depends only on whether the facts justifying it exist. But in Section 17 (Trans. p. 27) the right was further reservd to the City to repeal the ordinance and terminate all rights by that method " if the franchise granted hereby is not operated in accordance with the provisions of this ordinance."

Now at sometime prior to April 1913, permission had been given the Railway Company to furnish sundry consumers electric current for lighting as well as other purposes, which per-

mission was revocable at any time, as stipulated in the ordinance. But by that time the City had acquired an ample electric generating plant sufficient to cover the entire lighting business within its boundaries, and it therefore exercised its right to recall all the lighting permits outstanding.

This action was taken in a polite manner, April 2nd, 1913, by the adoption of Resolution 6118 (Trans. p. 7), and it was resolved "that said Tacoma Railway and Power Company, from and after the 15th day of April, 1913, cease to furnish or supply any person or corporation in the City of Tacoma any electric current for lighting purposes."

The City Clerk was directed to deliver a copy of the resolution to appellant, and he did so forthwith.

But the Railway Company ignored the notice and continued furnishing lighting current as before.

Then on April 21st, the Council adopted Resolution 6131 (Trans. p. 9) in accordance with the provisions of Section 11 and 17, warning the Company of its violation of the condition regarding the furnishing of current for lighting purposes, and caused the Commissioner of Public Works to give further notice that unless it ceased its violation of the ordinance within thirty days after service of the notice, the franchise granted by the ordinance would be held null and void; that the poles and wires would be forfeited if not re-

moved within sixty days thereafter; and that the Council would repeal the ordinance.

The notice was given April 22nd, but the Company went right on ignoring the whole matter until the last day of the 30-day period, when it commenced an action in the Superior Court to enjoin the City from forfeiting the franchise. The answer contained a cross-complaint demanding that the franchise be decreed forfeited. After trial on the merits judgment was entered as prayed for in the answer, and the case was appealed to the Supreme Court of the State, where is was affirmed. The report of the case is in 79 Wash. p. 508, and for the purpose of more clearly showing the issues before that Court, a certified copy of the record of the Superior Court was made Defendant's Exhibit C, of the record here.

This is the case referred to by Judge Cushman in his opinion, (Trans. p. 35).

So much has been stated, not for the purpose of claiming *res judicata*, but to sustain the Court below in its findings on points wherein the federal courts follow the state courts. We simply invoke the rule clearly stated by Justice Linton in *Louisville Trust Co. v. Cincinati*, 76 Fed. 296-301.

These points are printed at p. 45 of theTranscript, as follows:

1. Was the condition in the ordinance that the appellant should not furnish electricity for lighting purposes a valid one; that is, did

the city have the power to so limit the franchise?"

The answer of the Supreme Court to this query was:

"In respect to the first question, there seems little room for a difference of opinion. The statute quoted, Rem. & Bal. Code, Sec. 7507, subd. 7 (P. C. 77 Sec. 83), expressly empowers cities of the first class to regulate and control the use of streets, and to "authorize or prohibit" the use of electricity at, in, or upon any of the streets, "and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof." Broader language could hardly be used. It is obvious that the legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter. State ex rel. *Spokane & British Columbia Telephone & Telegraph Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495. In the Coverdale case, in considering a similar question, the court said: "The unqualified right to grant or refuse at discretion carries with it the right to impose any terms on the grant not forbidden by law."

"Authority from the legislature to regulate and control the use of the streets, to vacate them, to authorize or prohibit the use of electricity upon the streets, and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof, is so broad in its nature that it is clear the legislature intended to empower cities of the first class to hedge any such privileges with all the conditions that the state itself could impose. The charter adopted by the people in pursuance of this authority shows that the people intended to reserve to themselves the exclusive right

to furnish light to the city and its inhabitants, to the extent of the ability of the city, and no statute has been cited which limits or qualifies the right of the people of cities of the first class to do so."

(79 Wash. 514-15.)

2. If so, was the limitation abrogated by the public service commission law (Laws 1911, p. 543?"

This question was thus disposed of by the Supreme Court:

"In respect to the public service commision law, and sections 8, 30 and 33 (3 Rem. & Bal. Code, Secs. 8626-8, 8626-30, 8626-33), which are relied upon by the appellant, it seems sufficient to say that that law deals only with the questions of safety, efficiency, rates, and equality of public service. The power to grant a limited franchise is still in the city. No power was given to the public service commission to grant, modify, or abrogate franchises or contracts arrising out of franchies except in repard to rates and the regulation of service in respect to its safety, efficiency, and equality. It was not the purpose of the act to enlarge franchises, or to require the performance of acts being exercised under a franchise which could not be legally exercised, or for a longer period than such acts could be legally exercised. The appellant has cited *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D. 78; *Seattle Elec. Co. v. Seattle*, 206 Fed. 955, and *Worcester v. Worcester Consol. S. R. Co.*, 196 U. S. 539. In the Webster case, it was held that the right to fix the rates of telephone companies was vested in the public service commission. In *Seattle Elec. Co. v. Seattle*, Judge Rudkin held that the public service commission law withdrew from cities the power to fix fates for street car service. In the Worcester case, it was held that the state had

the power to abrogate the limitations and conditions contained in a franchise. None of these cases are apposite to the question before us."

(79 Wash. 515-16.)

The third point considered by the Supreme Court was:

"Did the refusal of the appellant to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warrant the Court in adjudging a forfeiture?"

The answer was emphatically in the affirmative, the Court saying:

"The authority to declare the forfeiture is so clearly expressed as to remove the question from the sphere of debate."

Judge Cushman (Trans. p. 46) yielded adherence to the same view, thus:

"In view of the reasoning of the State Court and the analysis made by it of the decisions on this question , its ruling is approved and followed."

For the details of that reasoning we shall beg to refer to the opinion; but we wish to emphasize one matter.

Appellant in the case below, as it probably will here, endeavored to confuse the record by imputing some fault to the City because it was not "ready" to take over the Northern Pacific business when it passed the two resolutions, and because the Northern Pacific's system at South Tacoma was a combined one of both light and power, which it would have cost something to separate into parts.

But the Railway Company, officered by astute men and advised by competent counsel, was bound to know that under any permits which might be granted the combination of power and light service was liable to become embarrassing at any time, and they knew, too, that the Company could not, with any certainty whatever, make a contract with any of its patrons for a ten-year combined service. The City had been operating its light plant since 1893 and its intended construction of a large generating system was perfectly well known; also, that it would demand cessation of appellant's lighting operations upon completion of the new system was perfectly certain and apparent.

Accepting Judge Cushman's kindly view that it did not appear that there was hostile defiance on the part of the Railway Company's officers of the resolutions, it remains that for a month and a half there was persistence in refusal to cease the lighting business; and the Company developed, both in the pleadings in the case made and in the arguments in both Superior and Supreme Courts, which are continued here, that the refusal was based, first, on a claim that the engagement which the Company had entered into was not binding upon it, and, secondly, that a subsequent law had, unsuspectedly, relieved it of that obligation—both unconscionable positions for it to take, for as was said in *Southern Bell Tel. & Tel. Co. v. Richmond*, 103 Fed. 31, where like contentions were made against the power of the city to enact and enforce conditions:

"It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent. Then, if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, *ultra vires*, and void, and in fact it never had consented in the only way in which complainants maintain it could consent. From this point of view, the condition precedent of the act of the general assembly has not been performed. In order to maintain and operate its lines in Richmond, the telephone company is without the consent of the council, and must obtain it."

In that case the ordinance was repealed within two years after its passage, but there was no hardship in it because by its own terms the right to repeal was reserved. The Court of Appeals of the Sixth Circuit merely gave effect to the agreement of the parties, and of that no one can complain.

There never was any fair question of the City's taking over the entire Northern Pacific power load. It had no desire to do so and no expectation of any such thing. It had no thought but that the Railway Company, upon its being notified of the withdrawal of its permits, would accept the situation in compliance with its franchise. If the Company had involved itself in a contract with the Northern Pacific which it could not carry out, and induced it to construct machinery which was not suitable, it was for the inducing party to untangle the situation. But instead of yielding adherence to its pledges within such necessary additional time for adjustment of its relations to its patrons as would have

been readily granted by the City, it at first treated the action of the Council with indifference, and then with what amounted to defiance, since its opposition was based on matters about which the Supreme Court said there was "no room for difference of opinion" and which were beyond "the sphere of debate." It sought to force a waiver of the demands of the resolutions by urging that the Northern Pacific Company would be discommoded and perhaps suffer delay in its shop work if the light and power business were segregated. It feinted to turn over to the City the entire light and power business at the South Tacoma shops, when it knew that although the City could take over the lighting business, which was all it was demanding, at any time on short notice, it could not take the power business, which it fully expected the Railway Company to retain, for several months. This tender of the entire business was mere bluff for the purpose of frightening city officials at the idea of disturbing, and maybe temporarily stopping, a great industry. For more than forty days after the permits were recalled, and for all but one of the thirty days allowed by the second resolution, nothing whatever was done by the Railway Company to put itself on the safe side in case its contentions should prove groundless. It did not even ask the Council for an extension of time, or for an agreed case, or anything which might have postponed the effect of the second resolution. On the contrary, when it did act it did so with bludgeon and battle axe.

Its complaint attempted to avoid its obligation not to sell power for lighting purposes by alleging that it had contracted to sell power to the Northern Pacific Railway Company in bulk and claiming that it could not be held responsible if its vendee used some current for lighting, (Complaint, Exhibit C, Par. VII) though the contract it had made, when produced, showed that it had expressly bound the Northern Pacific to purchase all its current for both power and lighting from the Railway Company for ten years. Its reply, however, developed that it was not only claiming entire absolution from the conditions of its franchise but, also, that the Public Service Act had made it unnecessary that it have any franchise at all, or, in short, that being on the ground it, in effect, had a universal and perpetual franchise for every electrical purpose without any resort to the City for authority to use the streets.

In the presence of such an attitude on the part of its gratuitious beneficiary the City could, in self respect, do no less than assert its right to terminate the whole arrangement, or thenceforth know that it had no control whatever over its streets so far as the Tacoma Railway & Power Company was concerned.

THE SUGGESTED WAIVER.

The City of Tacoma is a municipal corporation whose legislative body consists of a Mayor and four councilmen. The franchise under consideration was granted by ordinance, so that no city officer had any authority to vary its terms or waive any

of its conditions. The resolutions were adopted by the Council and were of the same legal effect as if they had been ordinances; and both of them, couched in words identical with the franchise ordinance and referring to it, expressed clearly the purpose intended.

Yet, emissaries of the Railway Company, without going openly to the Council and there having out to a settlement such matters as the Company saw fit to present, commenced a sort of seige of the Commissioner of Light and Water to get him to agree to something which would have been contrary to the resolutions of the Council, but which might have been claimed as a waiver or estoppel as against the City. He was asked if certain things would not be "all right" and was urged to sign a certain paper which would have made it appear as though he were requesting the Railway Company to go on with its Northern Pacific transaction just as before. He fled to the City Attorney for relief, and was told not to sign the paper at all. Interviews were had with the Attorney at which it was "supposed" that the City would bring a suit and other suggestions were made and talk had, upon which it is now contended that the innocent lambs were led to believe that the Council and all were merely laying a foundation for a lawsuit and by no means meant what was said in the resolutions.

No support for any such self-delusion appears in the evidence of what took place at any of these interviews; but the Court below allowed appellant to put

in evidence several letters between its own agents which were never seen by any one representing the City, and in which one agent assured the other of his construction of what was happening. Of course these letters were inadmissible for any purpose except as they showed how this great street railway corporation entrusted affairs of so great importance to one who appears to have had no conception of the manner in which they should be handled.

In spite of assurance that no suit would be brought except by the Railway Company itself, nothing was done except service of a complaint on the last day allowed by the second resolution. No order was asked for or made stopping the running of the time, and on the next day the forfeiture became absolute.

The case was heard and determined in thirteen days after it was commenced; and the same diligence would have furnished the decision at any time after May 5th, leaving at least fifteen days in which the Company could have easily adjusted itself to the situation. But it chose to go on in its own way, using up all the time, and neither asking nor proposing to give quarter.

In the last analysis of the matter, however, it stands out pretty clear that appellant never placed any reliance upon the propositions it put forth, but merely sought by the assertion of broad claims, to delay the time when it would have to either give up its profitable Northern Pacific contract entirely

or be at the expense of about $1,500 for the reconstruction of the service wires at the South Tacoma shops. In aid of the policy of delay was the effort to procure from city officials with no authority whatever in the premises, letters, or at least expressions, which would serve in the future to found a claim of waiver upon—something to aid in an argument over the sacredness of franchises and vested rights and the abhorred forfeiture.

APPELLANT.

We submit that appellant had no interest in this franchise.

As against third persons a chattel mortgage must describe the subject matter and locate it so that it may be identified.

6 Cyc. p. 1022, et seq.

At common law a chattel mortgage upon property subsequently acquired is void except as between the parties.

6 Cyc. p. 1041, "Future Interests."

In Washington, property of the character of that in controversy is personal property.

Dunsmuir v. Port Angeles Gas Co., 24 Wash. 104.

The right to mortgage after acquired personal property is peculiar to railroads and does not extend beyond such property as is actually employed in the operation of the railroad.

National Bank of Commerce v. Lock, 17 Wash. 528.

(Where the description was "all the property, real, personal and mixed, now owned or to be hereafter acquired by the Rainier Avenue Electric Railway Company.")

See Jones on Corporate Bonds and Mortgages, Chapter IV, Secs. 91 et seq., and particularly Sec. 104 and notes.

Brainerd v. Peck, 34 Vt. 496.
Guaranty Trust Co. v. Atlantic, etc., R. Co., 132 Fed. 68.

(See last paragraph of opinion, p. 75.)

Description: "All the certain railroad and other property, real and personal and franchises of said railroad Company, whether now owned or hereafter acquired by it."

Courts of equity will, in certain cases, give effect to a mortgage of property to be acquired subsequently, where no rule of law is infringed and the rights of third persons are not prejudiced.

Beall v. White, 94 U. S. 382.

But no lien will attach to after acquired property unless it is mentioned in the mortgage or referred to in terms clearly showing an intention to bind it.

27 Cyc. p. 1141, and note 9;
Maxwell v. Wilmington, etc., Co., 77 Fed. 938.

Language very similar to that above quoted from plaintiff's mortgage was construed by the Supreme Court of the United States in *Smith v. McCullough*, 104 U. S. 25. There a specific description of railroad property *followed* the words: "All the present and in the future to be acquired property of etc.," and the Court on page 28 said:

"The subsequent phrase "that is to say," followed by a detailed description of the different kinds of property which are embraced by the general words quoted, indicates that the mortgage was not intended to embrace every conceivable possession and right belonging to the railway company, but only the road and its adjuncts and appurtenances."

In this case the detailed description *preceded* the clause which referred to after acquired property "growing out of and appertaining to said property" that is being appurtenant to the street railway property mortgaged.

As to the doctrine of equity in case of the mortgage of after acquired property, see

Beall v. White, 94 U. S. 38-5-7;
Smith v. McCullough, 104 U. S. 25.

Here the Court said: "We will consider whether the bonds issued by Sullivan County are enhanced, or were intended to be enhanced, by the mortgage to the Farmer's Loan & Trust Company. That question is within a very narrow compass. It must be solved so as to give effect to the intention of the parties, to be collected as well from the words of the instrument as from the circumstances attending its execution, etc."

The circumstances here appear in the mortgage itself. It was an instrument made upon organization and consolidation of various street railways into one system. It was street railway property alone that was mortgaged. The property now before the Court had no existence, is not shown to have been contemplated or thought of, and even the ordinance creating the franchise did not come into existence for more than six years afterward. There is no pretense that it was in any way an appurtenance of the street railway.

But the learned District Judge, although recognizing the force of the authorities cited, deemed it sufficient that the parties to the mortgage had treated the franchise for power and heat as though it were covered by the instrument. (Transcript p. 38.)

We submit that such recognition had no effect to estop a third person from maintaining the contrary, and that the City of Tacoma was free to do so.

However, His Honor gave no damaging effect to his ruling on this point, since he further held that the mortgagee was bound by all of the conditions under which its mortgagor acquired the mortgaged property, citing

Jones, Corp. Bonds and Morts., Sec. 114:

That is, if the appellant did acquire a lien upon this franchise and property, it was entirely subordinate to the City's right to purchase at a reasonable price, to forfeit the franchise, and to take the prop-

erty if not removed in sixty days after forfeiture. The preliminary to forfeiture was a thirty-day notice to the Tacoma Railway & Power Company. The penalty for failure to operate was the passage of a repeal ordinance, which required no notice at all.

The case of *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, is not in point here at all, though greatly relied upon by appellant.

The franchise there was construed to be a perpetual one by interpretation of parties, with the right reserved to the City to "declare the *necessity* of removing" the poles and wires from the streets, and it was because the ordinance directing the city electrician to disconnect all heat and power wires of the company contained no declaration of public necessity, and it was not claimed that there was any such necessity, that the Court held the ordinance void. There was no question of forfeiture in the case.

A case much more nearly in point is *Calder v. Michigan ex rel Ellis*, 218 U. S. 591, where the legislature under a reservation in a charter, repealed it, and the Attorney General brought quo warranto against the corporation to oust it from further carrying on business. It was a water company rivaling the municipal water plant of the City of Grand Rapids. The case was in error to the Supreme Court of Michigan, which sustained the ouster. A plea was made for bondholders, but at the close of

the opinion the Court said:

"The only question before us now is the validity of the judgment ousting the defendants from "assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company." This really is too plain to require the argument that we have spent upon it. *We may add that it is a matter upon which the bondholders have nothing to say.*"

Palestine Water & Power Co. v. Palestine (Texas Supreme Court 1898), 40 L. R. A. 203, is a case of the same general character as this where it was complained that a receiver appointed at the suit of bondholders was not made a party. The Court said (p. 206):

"This suit was instituted to revoke and set aside the contract between the city of Palestine and the Palestine Water & Power Company, as well as to annul the ordinance which granted to the water and power company the right to occupy its streets, and the state court thereby acquired jurisdiction of the subject-matter before the receiver was appointed by the United States circuit court. *Reisner v. Gulf, C. & S. F. R. Co.*, 89 Tex. 656, 33 L. R. A. 171. It was not necessary to make the receiver a party to the suit. If he desired to defend the action, he had the right to make himself a party. *City Water Co. v. State*, 88 Tex. 600; 5 Thomp. Corp. Secs. 6893-6896. The corporation, the Palestine Water & Power Company, cannot complain because the receiver was not made a party defendant, because, if he was a necessary party, the judgment will not affect any interest that he has in the subject-matter of litigation, and it would be of no benefit to the defendant to make the receiver a party."

Reserving its right under the stipulation on file, to answer the appellant's brief, appellee submits

that the judgment of the Court below should be affirmed.

Respectfully,

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